we conclude that the adopted rules relating to the tariff process are appropriate.

VI. COMPENSATION FOR TERMINATING LOCAL TRAFFIC

Rule 4 sets forth the requirements relating to compensation for terminating local traffic. The parties disagreed on a number of provisions contained in this rule, including: (1) how providers should compensate each other for the termination of calls on each other's networks, by bill and keep[17] or reciprocal compensation[18]; (2) should the rules incorporate a business-residence support charge; (3) what other rate principles should be incorporated in the rule (*e.g.*, setting termination charges equal to access rates, allowance of flat rates)?

A. Bill and Keep

1. Substantial disagreement existed between the parties regarding the propriety of adopting a bill and keep method. Staff and the OCC recommended use of bill and keep on an interim basis. USWC flatly opposed adoption of the method even on a temporary basis as suggested by Staff and the OCC. Generally, the new

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[17] Under a bill and keep arrangement (or mutual traffic exchange), each LEC provider "bills" its respective end-user and "keeps" the associated revenue. No compensation changes hands between LECs.

[18] Under reciprocal compensation, LECs would compensate each other for the termination of traffic on their networks. Rates and charges would reflect each provider's cost.

entrants recommended use of bill and keep until certain market tests are met. They also opposed the proposal by Staff and the OCC as incorporating an arbitrary time period.

2. USWC, as just noted, was the primary opponent of bill and keep even as an interim measure.[19] According to USWC: The primary reason for its opposition to the method is that bill and keep does not reflect cost causation, and, therefore, is inconsistent with economically rational pricing. Bill and keep will likely not accurately reflect cost for two reasons. First, traffic between providers is unlikely to be in balance. Second, it is also unlikely that various providers' cost of terminating traffic will be the same (*e.g.*, the networks of various providers may be different in character depending upon factors such as regions served). If either circumstance occurs, bill and keep would not accurately reflect cost.

3. USWC also argues that, if access rates are different than terminating charges for local traffic, bill and keep would lead to rate arbitrage. That is, there would be an incentive for

[19] CITA does object to bill and keep as a permanent compensation plan. Apparently, for reasons of costs associated with implementation of reciprocal compensation, CITA recommended that the independent telephone companies be permitted to remain under the existing bill and keep arrangement until "decisions could be made regarding cost recovery methods and compensation arrangements." CITA February 29, 1996 comments, page 4.

providers to seek classification of toll traffic as local, in order to avoid access rates.[20]

4. Finally, USWC argued that the Act prohibits adoption of bill and keep. This argument was based upon the provisions of § 252(d)(2)(A), which require that each provider recover its transport and termination costs. Since, according to USWC, bill and keep is not reflective of cost causation, it would contravene the Act. USWC, for all these reasons, opposes bill and keep even on an interim basis.

5. In response to argument that LECs are now unable to measure terminating local traffic, USWC represented that it is in the process of developing a mechanism for measuring such calls. USWC stated that this system has already been deployed, or will soon be deployed in areas where it is facing local exchange competition. According to this comment, the cost of the system "is a small part of the overall cost to provide local interconnection services and would be provided as support for the pricing of local interconnection service in Colorado." USWC February 21, 1996 Comments, page 18.

6. The new entrants primarily argued that bill and keep is appropriate, at least as an interim arrangement, because it will promote competition in the local exchange market. In particular,

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[20] USWC also suggested that we adopt a rule which would set terminating local traffic rates equal to access charges.

the method would avoid the measurement and billing costs entailed in a reciprocal compensation scheme, and, as such, would encourage entry into the market. The new entrants also pointed out that the measurement system being implemented by USWC is apparently a work-in-progress. Moreover, since only USWC possesses the system, new entrants would be required to purchase it from USWC at some as-yet-unknown costs. This result, it was suggested, is inconsistent with the intent of HB 1335 to foster competition.

7. The new entrants also argued that, contrary to the contention of USWC, the Act specifically authorizes the use of bill and keep. *See* § 252(d)(2)(B)(i) (specified pricing standards shall not be construed to preclude the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery).

8. The new entrants finally disputed the Staff and OCC proposal which, according to the argument, sets an arbitrary date for transition to a reciprocal compensation method. AT&T and MCI proposed a "market-based" analysis for such a transition. Under their proposed rule, a permanent local call termination compensation scheme would be established only after an incumbent LEC, has filed TSLRIC studies for the switching, transport and other components used in terminating local calls, has unbundled the facilities or functions identified in the unbundling rule, and has provided true number portability.

9. Generally, Staff and the OCC proposed that bill and keep be utilized until three years after the effective date of the rules, or six months after the implementation of a number portability database, whichever occurs first. This proposal, Staff and the OCC asserted, will provide incentives for providers to obtain approval of appropriate rates and will expedite implementation of local number portability. According to Staff and the OCC, this interim measure would also serve the goal of promoting competition.

10. We accept the Staff/OCC recommendation for the suggested reasons. In addition, some of the arguments made by USWC and the new entrants persuade us to adopt the Staff and OCC proposal. It is apparent that there is presently no proven mechanism readily available to new entrants for measuring terminating local traffic. Thus, the cost of measurement and billing under a reciprocal compensation arrangement are unknown at the present time. Therefore, we will not accept USWC's position that bill and keep is inappropriate even as an interim measure. As for the arguments relating to the Act, we agree with the new entrants that bill and keep is not prohibited.

11. We also reject the position of the new entrants that bill and keep be approved for some unknown period of time. USWC appears to be correct that bill and keep may not ultimately be reflective of cost causation. As such, we should adopt a rule

which will encourage the development and deployment of effective measures to move to reciprocal compensation. We find that the Staff/OCC suggestion is appropriate in view of all these considerations.

B. Business/Residence Support Charge

1. USWC, with the support of CITA, has consistently maintained that the rules should allow for the establishment of a Business/Residence Support Charge. According to USWC, this charge is intended to replace the implicit subsidy from high contribution business customers which will be lost when these customers choose an alternative provider. We note that this proposal is based upon a number of assertions regarding present rates and the future business activities of new entrants. Specifically, the proposal assumes--USWC claimed as much--that current rates for business basic exchange are set at a level far above costs. Next, the USWC contention posits that the high contribution from business subscribers (*i.e.*, the mark-up above cost-of-service for basic business service and optional services purchased by business customers) is used to subsidize residential basic exchange specifically. To the extent new competitors enter ~~the~~ local exchange market, USWC then anticipates, they are likely to serve business exchange customers almost exclusively. USWC concluded that, as it loses business customers and the large contribution

from the services these customers purchase, it will lose the subsidy provided to services purchased by residential subscribers.

2. USWC ultimately argued that if it is to be required to maintain the differential between business and residential local exchange service, it must be permitted to charge a Business/Residence Support Charge to interconnecting local exchange providers. That charge would be assessed either as a flat charge per alternative exchange provider access line, or as a per minute-of-use charge for local calls that another provider delivers to USWC for termination on the USWC network. Additionally, USWC contemplates that the charge would be assessed upon competitors whose ratio of business/residence customers is less than USWC's comparable ratio.

3. This proposal was opposed by all other parties (except for CITA) for various reasons.[21] For example, a number of commenters maintained that a Business/Residence Support Charge would be anti-competitive, inasmuch as it would preserve implicit subsidies in the rates of incumbent LECs. The charge would, in effect, cause new entrants to subsidize incumbent providers. As an anti-competitive measure, the new entrants also claimed, it is prohibited by the Act.

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[21] In fact, some of the parties (*e.g.* AT&T) suggested that we adopt a rule which would expressly prohibit collection of a charge like a Business/Residence Support Charge in the permanent local call termination rate.

4. Staff and the OCC recommended that we reject both the USWC proposal as well as any proposal which would explicitly proscribe a charge like a Business/Residence Support Charge. We agree with their reasoning. The above discussion points out that the justification for the proposal depends upon a finding that residential basic exchange service is being subsidized by business basic exchange. The present record does not support such a finding. In our view, the USWC proposal is essentially a rate-making matter. That is, the necessity for such a charge must be investigated in a ratesetting case, applying appropriate ratemaking principles (*e.g.*, whether considerations regarding universal service justify a Business/Residence Support Charge). It would be inappropriate to approve (or disapprove) such a charge in this rulemaking proceeding. We will decline to do so.

C. Termination Rates

1. Rule 4.6 provides that the rates for terminating local traffic may be usage-based; flat charges based upon, for example, capacity port charges; or some alternative mechanism. The Commission will examine the rates of individual providers pursuant to the provisions of Rule 7.2 (*i.e.*, through the tariff process).

2. We specifically decline to adopt the proposal by USWC that rates for terminating local traffic be the same as switched access rates. USWC proposed this rate structure, apparently, to

preclude rate arbitrage. *See* discussion *supra.* Depending upon the level of access rates, such a rate design could be substantially anti-competitive. Moreover, as with other instances in which the parties have urged us to adopt specific ratemaking principles, we conclude that this type of proposal should be investigated in a ratesetting case.

VII. OTHER INTERCOMPANY ARRANGEMENTS

1. Rule 5 sets forth requirements relating to a number of necessary arrangements between competing telecommunications providers. Most of these items were, for the most part, agreed to by the parties. In part, the rule: requires providers to deal with each other in good faith (Rule 5.1); directs providers to offer service in accordance with applicable Commission rules (Rule 5.2); requires all providers to afford reasonable access to poles, ducts, conducts, and rights-of-way (Rule 5.3); compels competitors to offer interconnecting providers with both answer and disconnect supervision as well as all available call detail information necessary to enable proper customer billing (Rule 5.4); requires providers to enter into mutual billing and collection agreements (Rule 5.5); directs that providers offer the interoperability of non-optional operator services between networks (Rule 5.6); commands that providers develop mutually agreeable and reciprocal arrangements for the protection of customer proprietary network

information (Rule 5.7); requires that providers cooperate in development and implementation of procedures for service repair referrals (Rule 5.8); directs that providers offer necessary operational support to enable other providers to offer service consistent with Commission rules (Rule 5.9); and requires providers to make available access to technically-reasonable, non-proprietary signaling protocols used in the routing of traffic.

2. Rule 5.12 sets forth certain directives regarding the provision of a "White pages" directory. Since there was some controversy regarding this issue, we discuss the rationale for the adopted rule here.

White Pages

1. USWC and CITA contended that each local exchange provider should be responsible for assuring that their customers' listings are included in a directory. These parties suggested that directory publishing is a fully competitive activity. As such, they maintained, no provider (*e.g.*, the incumbent LEC) should be responsible for assuring that the listings of customers of other providers appear in a White Pages directory.

2. The new entrants argued that provision of a White Pages directory is necessary in order to promote competition. That is, these parties claimed that requiring each new entrant to publish a directory would be a significant barrier to entry. Moreover, the

parties suggested, adopting a rule which might result in the proliferation of multiple White Pages directories would not be in the public interest. Rather, the parties argued that publication of a single comprehensive directory by the incumbent LECs, the circumstance which exists at the present time, is most appropriate.

3. The new entrants requested that the White Pages directory rule require: (1) that listings for the customers of new providers appear in the incumbent LECs' White Pages directory and in the yellow pages directory for business customers; (2) that new providers have comparably easy-to-find information included in the customer guide pages of the White Pages directory; and (3) that all customers be provided a directory by the incumbent LEC. Finally, the new entrants asserted that incumbent LECs should provide a White Pages directory at no charge to new providers. The new entrants specifically requested that they be provided equal space in the customer call guide pages for free, and that their customers be provided a White Pages directory (by the incumbent LEC) also for free. Apparently, the new entrants believe that publication of a comprehensive White Pages directory (*i.e.*, a directory which includes the listings of all customers, including those of other providers) has intrinsic value. That value would inure to the incumbent LECs as publishers of the directory and should be considered as in-kind compensation for any costs associated with publication of the directory.

4. Staff and the OCC followed a more moderate approach than the new entrants, USWC and CITA. Staff and the OCC agreed with the new entrants that incumbent LECs should be compelled to provide a comprehensive White Pages directory. In the Staff's and OCC's view, provision of a single White Pages directory to telephone customers is in the public interest. These parties also agreed that imposition of a directory publication requirement upon new entrants would constitute an unreasonable barrier to entry. Consequently, Staff and the OCC supported the principle that, in the absence of Commission action placing responsibility upon another provider, the incumbent LECs should serve as the "provider of last resort" for publication of a White Pages directory. Staff and the OCC, however, would place responsibility for actual delivery of the published directory to end-users upon new entrants (*i.e.*, new providers would be required to deliver the published directory to their own customers). Finally, Staff and the OCC would permit the incumbent LECs to charge other providers for publication of the White Pages directory.

5. We accept the Staff and OCC position for the reasons stated in their arguments. That position reasonably balances the interests of incumbents and new entrants. Rule 5.12 sets forth the requirements for the White Pages directory. In part, the rule:

(1) requires incumbents to "cause"[22] a comprehensive White Pages directory to be published and delivered to new entrants; (2) places responsibility for delivery of the published directory to their own customers upon each provider; (3) places responsibility upon each provider for provision of accurate subscriber listing information (*i.e.*, name, address, and telephone number) to the White Pages provider; (4) requires the White Pages provider to offer premium listings to the customers of competing providers; and (5) requires the White Pages provider to offer space in the customer guide pages of the directory. In addition, the rates, terms, and conditions associated with the transfer of customer listing information, the publication of the White Pages directory, the publication of customer guide information, and the publication of premium listings for the customers of competing carriers, shall be established in filed tariffs. *See* Rule 7.4.

VIII. <u>UNBUNDLING REQUIREMENTS--RULE 6</u>

There was substantial disagreement among the parties concerning unbundling provisions to be included in the rules. Items of controversy included: (1) what network elements should be unbundled; (2) should unbundling mandates apply to all providers or to incumbent LECs only; (3) what rates, terms, and conditions

[22] The rule does not mandate incumbent LECs to actually publish the directory themselves. This provision recognizes that, presently, many incumbents contract with third parties for actual publication of the directory.

should apply to unbundled services; and (4) what process should apply with respect to implementation of unbundling (*e.g.*, a tariff process)?

A. Elements to be Unbundled

1. Rule 6.1 and 6.2 require incumbent telecommunications providers to offer access to a number of network elements designated as "essential facilities or functions". These include: loop, local switching; common transport links, dedicated transport links, local and toll tandem switching, operator systems, signaling links, signal transfer points, and access to each service control point via signal transfer points. This list of "essential" network elements which incumbents will be compelled to unbundle was suggested by Staff and the OCC.

2. In recommending the list of services to be unbundled, Staff and the OCC considered technical feasibility, economic feasibility, and the necessity of the elements to the provision of local exchange service by new entrants. We find these considerations to be appropriate, and, as stated above, agree with the recommendations by Staff and the OCC. Based upon the extensive comment provided in this case, we conclude that the listed elements are reasonably necessary (*i.e.*, essential) to the promotion of competition in the local exchange market, as directed in HB 1335.

3. To one degree or another, virtually all other parties disagreed with the Staff and OCC position. The USWC list of elements subject to unbundling was virtually identical to the Staff's and the OCC's list with one exception. In USWC's view, operator systems are not essential to competition in the local exchange market, inasmuch as these services are already competitive. Therefore, USWC opposed unbundling of operator systems. Other comment, however, suggested that services provided by operator systems (*e.g.*, intercept; operator handled calls such as collect calling, calling card, person-to-person, etc.; busy verification; busy interruption; etc.) are critical to a new entrant's ability to enter the local exchange market. *See* AT&T January 22, 1996 Comment, pages 14-15. We are persuaded by that comment, and conclude that operator systems should be subject to the rule's unbundling mandate.

4. USWC also expressed concern with designating some elements as "essential," since this designation may require it to impute the charges for those elements into its prices for other services. Notably, Rule 7.6.2 directs that imputation shall be required (*i.e.*, a provider shall impute its charges for unbundled network elements into the rates for its own services) only for elements which are "bottleneck monopoly input(s)". This provision is consistent with the suggestion of a number of the commenting

parties. For example, Staff pointed out that an imputation requirement will limit pricing flexibility on the part of incumbent LECs (and the Commission) with respect to retail services. Such a requirement, if not carefully circumscribed, might give new entrants an undeserved competitive advantage. Thus, Staff and other parties recommended that imputation requirements be limited to bottleneck monopoly inputs only.

5. Rule 7.6.2 further provides that the designation of an element as an "essential facility or function" (*i.e.*, inclusion of a network element in Rule 6.2) shall not constitute a conclusive finding that the element is a bottleneck monopoly input. In effect, Rule 7.6.2, leaves open the question regarding imputation requirements for specific unbundled services. We conclude that this question should be decided in future proceedings (*e.g.*, where specific rates for a provider's unbundled network elements are established).[23]

6. AT&T and MCI supported the Staff and OCC list of unbundled network elements also with one exception. These parties argued that it is essential for the local loop component to be unbundled into three separate elements: loop feeder, loop concentration, and loop distribution. According to this contention, new entrants should have the ability to use only those portions of the loop which are necessary to serve their customers. Therefore,

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[23] Rule 7.6.1 also states that imputation shall be required with respect to a provider's prices for interconnection, the termination of local traffic, and "White Pages" directory listings, in accordance with the Costing and Pricing Rules. We point out that Rule 4(1)(f) of the Costing and Pricing Rules states that cost studies for any service offerings that include, as underlying functionalities, any tariffed fully regulated service must impute the tariffed rates as a part of the cost-of-service.

competing providers should have the capability to interconnect with the incumbent LEC at any of the above-specified points (*i.e.*, loop feeder, loop distribution, or loop concentration).

7. Comment by USWC and CITA indicated that it would be difficult to implement unbundling of the loop into feeder and distribution. For example, USWC claimed that existing loop plant is not concisely segmented into "feeder" and "distribution" plant with clearly defined points of interface. In addition, USWC suggested, the current loop network was not designed with the thought of unbundling in mind, and assumed one provider. According to USWC:

> With multiple providers interfacing at points in the loop, new interfaces would have to be developed, so that different providers could interconnect. New security procedures would be needed to assure network integrity . . . The fact is, unbundling the loop into feeder and distribution cannot be accomplished without significant expenditures to reengineer the way loops are provisioned.

USWC January 17, 1996 Comments, page 60. This comment, at the very least, raises questions regarding the advisability of loop unbundling as advocated by the new entrants. Additionally, § 271(c)(2)(B)(iv) of the Act requires unbundling of the loop without any mention of further unbundling of the loop into subparts. At this time we decline to adopt the AT&T/MCI suggestion.[24]

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[24] As suggested by Staff and the OCC, we may revisit the list of elements required to be unbundled after the FCC has made its determinations regarding unbundling.

8. Other parties such as MFS and Comptel took greater exception to the Staff and OCC unbundling recommendation. These parties claimed that the proposal is overly restrictive in its unbundling mandate in light of the provisions of the Act. Specifically, these parties argued that the Act's unbundling requirements are not limited to "essential" or "necessary" facilities. *See* §§ 251(c)(3), 251(d)(2)(B). These parties interpret the Act as directing unbundling in any instance where failure to unbundle would impair a provider's ability to provide the service it seeks to offer. Therefore, it was claimed, the Staff and OCC proposal is inconsistent with the Act.

9. We do not agree with these assertions. Section 251(d)(2) directs that, in determining what network elements should be unbundled, the FCC shall consider: (1) whether access to such network elements as are proprietary in nature is necessary; and (2) whether the failure to provide access to network elements would "impair" the ability of a telecommunications carrier to provide the services it seeks to offer. These provisions indicate, first, that incumbent LECs may not be required to provide unbundled access to proprietary network elements. Second, the FCC's forthcoming regulations will provide access to non-proprietary elements, apparently, only in instances where a provider's ability to offer service would be *impaired* by failure to unbundle. We agree with USWC that this "impairment" standard appears to be similar to the essentiality criterion set forth in HB 1335. In any event, it is

not apparent at this time that our adopted rule and the rationale for the rule are inconsistent with the Act.[25]

B. Applicability of Unbundling Rules

1. Rule 6.1 requires *incumbent* telecommunications providers to unbundle the facilities or functions listed in the rule. Significantly, the rule does not compel other providers (*i.e.*, providers not classified as "incumbents") to unbundle their networks. According to the definition of "incumbent telecommunications provider" contained in Rule 2.10, all existing LECs (as of February 8, 1996, the effective date of the Act, will be considered as incumbent providers and required to unbundle their networks. However, Rules 2.10 and 6.1, in effect, provide that new entrants shall be considered to be incumbents three years after the date of certification, unless the Commission determines that such designation is not in the public interest. Hence, absent a specific Commission determination to the contrary, a new entrant will be compelled to unbundle its network, in accordance with the rule, three years after the date of its certification. These provisions are based upon the final recommendations of Staff and the OCC regarding the applicability of the unbundling mandates. The new entrants and the incumbent LECs (*i.e.*, USWC and independent telephone companies represented by CITA) emphatically disputed these recommendations for vastly different reasons.

[25] As previously stated, we may revisit the rules after the FCC adopts implementing regulations for the Act.

2. The new entrants opposed the temporary exemption from unbundling requirements proposed by Staff and the OCC. Instead, these parties maintained that new providers should be flatly exempted from the Rules' unbundling requirements without limitation. TCI *et al.* suggested that the exemption for new entrants continue until the incumbent LECs are no longer the dominant providers in the local exchange market. At this point, the entire industry should be deregulated. Thus, in the contemplation of TCI *et al.*, new entrants would never be compelled to offer unbundled network elements to their competitors. Other parties such as MFS and Comptel apparently intend that this issue (*i.e.*, the necessity for new entrants to unbundle their networks) be determined by the FCC pursuant to the provisions of § 251(h)(2).[26]

3. As grounds for their positions, the new entrants argued: Significant policy reasons exist for not requiring new entrants to unbundle their networks. For example, TCI *et al.* stated that an unbundling mandate for new entrants would:

> --extinguish any incentive for new providers to invest in or develop new infrastructure;
>
> --deter entry into the market on the part of facilities-based carriers;
>
> --eliminate incentives for providers to upgrade or expand their networks;

[26] Those provisions empower the FCC to provide for the treatment of a new entrant as an incumbent under specified circumstances. Those circumstances are: (1) the new entrant occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by an incumbent LEC; (2) such carrier has substantially replaced an incumbent LEC; and (3) such treatment is consistent with the public interest, convenience, and necessity.

--in the case of cable system operators, negatively impact their technical ability to provide their core cable television business.

These results would follow under an unbundling requirement, TCI *et al.* argued, since competitors would have nearly immediate access to the network of a new entrant.

4. The new entrants also contended that HB 1335 and the Act prohibit application of an unbundling rule to new entrants. With respect to the provisions of HB 1335, TCI *et al.* asserted that subsection 40-15-503(2)(b) directs the Commission to establish rules for the unbundling of "essential" facilities. TCI *et al.* suggested that the term "essential" refers to the bottleneck facilities owned by incumbent LECs which are monopolies, or, at least, the overwhelmingly dominant providers in the market.

5. As for the provisions of the Act, the new entrants claimed that it also prohibits us from applying an unbundling requirement to new providers. These parties first argued that such a rule would constitute a barrier to entry (*i.e.*, potential facilities-based providers would not enter the market for fear of having to afford access to their networks to competitors) in contravention of § 253. Second, the new entrants suggested that the Act (*i.e.*, § 251(a-b)) intends that unbundling mandates apply to incumbents only. Given that intention, it was asserted, the Commission is precluded from adopting unbundling rules which treat new entrants and incumbents equally.

6. The new entrants specifically opposed the Staff and OCC recommendation to exempt new providers from the unbundling rule for three years (absent further directives from the Commission).

Besides contravening the Act and HB 1335, the parties alleged, this proposal constitutes an arbitrary determination as to when new entrants will be compelled to unbundle their networks. TCI *et al.* reasoned that the imposition of unbundling mandates on new entrants would be appropriate only when those providers possess a substantial share of the local exchange market and the incumbent LECs are no longer dominant providers. Finally, it was suggested that the Staff and OCC rule usurps the authority of the FCC to determine when new provides shall be treated as incumbents. *See* § 251(h)(2).

7. USWC and CITA disputed the arguments by the new entrants. These parties argued that the pro-competition policies expressed in HB 1335 necessitate application of unbundling requirements to all providers equally. Specifically, USWC and CITA claimed: It is in the interests of consumers that all local exchange providers unbundle their networks. Such unbundling would assure choices (both in quality and price) for providers seeking to purchase unbundled elements resulting in lower prices to end-users. In addition, a uniform unbundling mandate would impose the same cost requirements on providers, forcing them to be more efficient, again resulting in lower prices to consumers.

8. USWC and CITA further argued: The TCI *et al.* claim that unequal unbundling requirements should be approved in order to encourage new investment is invalid. Notably, TCI's Colorado network already is as extensive in the urban areas of the State as is USWC's network. Other potential competitors already have facilities-based networks in the regions of the State where com-

petition is likely to occur (*e.g.*, the Denver metro area). Thus, there is no justification for limiting unbundling to incumbent providers. Finally, USWC and CITA observed that, although the Act directs only incumbents to unbundle, it does not specifically preclude State commissions from adopting rules which would also require new entrants to unbundle their networks.

9. As noted above, we accept the Staff's and OCC's recommendation for a temporary unbundling exemption for new entrants. Staff and the OCC reasoned that a three-year period of time would give new entrants an opportunity to establish a market presence. In addition, eventual unbundling will serve to enhance competition. Their proposal also permits a new provider to further defer unbundling if it is able to demonstrate to the Commission that such action is in the public interest. We agree with this proposal and the Staff's and OCC's rationale.

10. We also agree, with USWC and CITA to the extent they point out that some of the likely competitors in the local exchange market (*e.g.*, TCI, AT&T, MCI, etc.) already have facilities in place. Moreover, we observe that the willingness of new entrants to construct new facilities will, in addition to unbundling requirements, depend on other factors such as the rates eventually set for unbundled network elements. Therefore, TCI *et al.'s* arguments regarding disincentives to new investment as a result of unbundling are not totally persuasive. TCI *et al.* further claimed that the lack of an unbundling requirement for new entrants would actually encourage them to undertake new investment in their network. It is less than clear that such a result will

follow. For example, it is possible that providers would forego new investment if they could continue to obtain network elements from incumbent LECs.

11. We do agree with the new entrants that, in light of the currently dominant market position of the incumbent LECs, it is appropriate to apply the unbundling rule to the incumbents only. Since this disparate treatment may result in less choice for providers, as argued by USWC, that dissimilar treatment should be limited. Generally, we find that the Staff's and OCC's approach reasonably balances all interests herein. That approach will also permit new entrants to further defer unbundling of their networks if the public interest requires it.

12. Finally, we note our disagreement with the arguments that the adopted rule is inconsistent with the Act. The provisions cited by the new entrants do not expressly prohibit States from requiring new entrants to unbundle. The discussion above also explains that the States retain extensive authority to regulate upon matters relating to unbundling. *See* paragraph E.3

C. Pricing and Tariffing For Unbundled Elements

The parties substantially disagreed with respect to pricing and tariffing of unbundled network elements. The issues here are identical to those relating to the pricing and tariffing for interconnection. *See* discussion above, paragraphs C, E.6. through E, E.6 Our holding here is identical. Briefly, Rule 7.3 requires providers, who are required to unbundle, to file tariffs. We find a tariff process to be appropriate for the purpose of establishing rates, terms, and conditions for unbundled network elements. We reject any argument that the Act prohibits any tariff requirements. In addition, the rates for unbundled elements will be set in accordance with the directives contained in Rule 7.5.

IX. CONCLUSION

The rules attached to this decision as Attachment A will be adopted (subject to applications for rehearing, reargument, or reconsideration). After consideration of the extensive comment filed in this proceeding, we find that the adopted rules are consistent with the legislative directives set forth in HB 1335.

X. ORDER

A. The Commission Orders That:

1. The rules attached to this decision as Attachment A are hereby adopted. This order adopting the attached rules shall become final 20 days following the mailed date of this decision in the absence of the filing of any applications for rehearing, reargument, or reconsideration. In the event any application for rehearing, reargument, or reconsideration to this decision is timely filed, this order of adoption shall become final upon a Commission ruling on any such application, in the absence of further order of the Commission.

2. Within 20 days of final Commission action on the attached rules, the adopted rules shall be filed with the Secretary of State for publication in the next issue of the *Colorado Register*